

DEPARTMENT OF COMMERCE

Bureau of Export Administration

15 CFR parts 740 and 743

[Docket No. 980814218-8218-01]

RIN: 0694-AB724

Clarification of Reporting Requirements under the Wassenaar
Arrangement

AGENCY: Bureau of Export Administration, Commerce.

ACTION: Interim rule with request for comments.

SUMMARY: On January 15, 1998, the Bureau of Export
Administration (BXA) published an interim rule implementing the
Wassenaar Arrangement list of dual-use items and reporting
requirements under the Wassenaar Arrangement. On February 17,
1998, BXA published an interim final rule that conformed the
savings clause date for shipments of items removed from
eligibility for export or reexport under a particular License
Exception authorization or the designator NLR until April 15,

1998. The February 17 rule did not affect the reporting requirement provisions and any item removed from License Exception or NLR eligibility as a result of the January 15 rule continues to be subject to the reporting requirements of the Wassenaar Arrangement. This interim rule provides further clarification on the savings clause provisions and the reporting requirements under the Wassenaar Arrangement. Specifically, this rule clarifies:

(1) The reporting requirement obligations of items described on the Wassenaar Arrangements Annex 1 (Sensitive List) and Annex 2 (Very Sensitive List) of the List of Dual-Use Goods and Technologies, including clarification on the timing of the first report in accordance with the savings clause provision;

(2) The reporting requirements for computers controlled under Export Control Classification Number (ECCN) 4A003.b;

(3) The reporting requirement procedures under License Exception TSR; and

(4) That the reporting requirement provisions do not apply to reexports, release of technology or source code to foreign nationals in the United States (i.e., "deemed exports" to foreign

nationals), or to items not controlled for National Security (NS) reasons.

In addition, this rule revises the country scope for reporting requirements.

DATES: Effective Date: This rule is effective October 14, 1998.

COMMENT DATE: Comments on this rule must be received on or before December 14, 1998.

ADDRESSES: Written comments should be sent to Patricia Muldonian, Regulatory Policy Division, Bureau of Export Administration, Department of Commerce, P.O. Box 273, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Patricia Muldonian, Regulatory Policy Division, Bureau of Export Administration, telephone: (202) 482-2440.

SUPPLEMENTARY INFORMATION:

Background

On January 15, 1998, the Bureau of Export Administration (BXA) published an interim rule (63 FR 2452) that made changes to the

Commerce Control List necessary to implement the Wassenaar Arrangement List of Dual-Use Goods and Technologies. In addition, the January 15 rule imposed new reporting requirements on persons that export certain items controlled under the Wassenaar Arrangement to countries outside of Country Group A:1 in order to fulfill the information exchange requirements of the Wassenaar Arrangement. The January 15 rule also removed License Exception availability for certain items controlled for missile technology reasons and for certain other items controlled for national security reasons for which the U.S. has agreed to license with extreme vigilance.

BXA received many industry comments on the savings clause provision date of February 17, 1998, for submission of license applications for items removed from eligibility for export or reexport under a particular License Exception authorization or the designator NLR, stating that more time was required to determine how the rule affected their products and to develop and revise their export compliance software necessary to implement the provisions of the Export Administration Regulations. In response to the industry issues raised, BXA published an interim rule on February 17, 1998 (63 FR 7699) that conformed the saving clause date for shipments of items removed from eligibility for export or reexport under a particular License Exception authorization or NLR until April 15, 1998. The February 17 rule

did not affect the reporting requirements of section 743.1 of the Export Administration Regulations, and any item removed from License Exception or NLR eligibility as a result of the January 15 rule continued to be subject to reporting requirements.

This rule provides further clarification on the savings clause provision of the February 17 rule and on reporting requirements under the Wassenaar Arrangement.

Clarification of reporting requirements of Items on the Wassenaar Arrangement's Annex 1 and Annex 2

Reporting obligations under the Wassenaar Arrangement are required for exports in accordance with the provisions of §743.1 of the Export Administration Regulations (items on the Wassenaar Arrangement's Annex 1 - List of Dual-Use Goods and Technologies (Sensitive List)), effective from January 15, 1998 until April 15, 1998, and for the following items on the Wassenaar Arrangement's Annex 2 - List of Dual-Use Goods and Technologies (Very Sensitive List), in which License Exceptions or the designator NLR have been removed and export license requirements imposed in accordance with the savings clause provision. Reports for Annex 2 items are also effective from January 15, 1998 until

April 15, 1998. After April 15, 1998, these items require a license for export or reexport.

License Exception eligibility has been removed and licensing requirements imposed for the following ECCNs on the Wassenaar Arrangement's Annex 2 - List of Dual-Use Goods and Technologies: 1A002.a, 1C001, 1E001, 4A003.b, 4A003.c, 4D001, 4E001, 5A001.b.9, 5D001, 5E001.a, 6A001.a.2.a.1, 6A001.a.2.a.2, 6A001.a.2.a.7, 6A001.a.2.b, 6A001.a.2.c, 6A001.a.2.e, 6A008.1.3, 6B008, 6D001, 6D003.a, 6E001, 6E002, 8A001.b, 8A001.d, 8A002.o.3.b, 8D001, 8E001, and 9A001. The Bureau of Export Administration will extract the necessary information from licenses to report these exports to the Arrangement.

The Wassenaar reporting requirement provisions do not apply to:

- (1) Reexports;
- (2) Any release of technology or source code subject to the EAR to a foreign national in the United States; or
- (3) Items controlled solely for Missile Technology (MT), Nuclear Nonproliferation (NP), Chemical and Biological Weapons (CB), or Short Supply (SS) reasons.

Clarification of License Exception TSR

BXA received comments from industry requesting guidance on how to comply with the Wassenaar reporting requirements for exports of technology under License Exception TSR. This rule clarifies that, for exports of technology under License Exception TSR for which reports are required under §743.1(c) of the EAR, exporters should report the number of units in the shipment as one (1) for the initial export of the technology to a single ultimate consignee. Additional exports of the technology must be reported only when the type or scope of technology changes or exports are made to other ultimate consignees. In addition, release of controlled technology or source code to foreign nationals in the U.S., should not be included in the reports.

Revisions to the reporting requirements for computers

In order to reduce duplicative reporting requirements on industry, this rule revises §743.1(c)(2) by eliminating the reporting requirement for computers controlled under 4A003.b for exports to destinations in Computer Tier 3. Reporting requirements for exports of such computers to destinations in Computer Tier 3 continue to be required under the post-shipment verification reporting requirements of §740.7(d)(4)(v) and §742.12(b)(3)(iv).

Clarification of reporting requirement for License Exception GOV

This rule corrects an inadvertent error in the January 15 rule for License Exception GOV. This rule revises §740.11(b)(2)(iii)(A) and paragraph (a) to Supplement No. 1 to §740.11 by revising the phrase "Items for official use within a national territory by agencies of the U.S. Government" to read "Items for official use within a national territory by agencies of cooperating governments".

Additions to the Commerce Control List and clarification of the savings clause provision

BXA received comments from industry requesting that BXA clearly describe the new entries that were added in the January 15 rule and explain the impact of those entries in accordance with the February 17 extension of the savings clause provision. This rule clarifies that, in addition to the modifications in some parameters of items controlled on the Commerce Control List, the following new entries have been added that control items previously (prior to January 15, 1998) eligible for export or reexport under the designator NLR. Items changed from NLR eligibility to requiring a license for export or reexport were authorized for export or reexport under the designator NLR in

accordance with the February 17 rule until April 15, 1998. After April 15, 1998, these items require a license for export or reexport. However, use of the designator NLR until April 15, 1998, does not relieve exporters of their responsibility to provide reports for items subject to the reporting requirements under the Wassenaar Arrangement retroactive from January 15, 1998 to April 15, 1998.

New ECCNs added to the Commerce Control List by the January 15 rule:

1A005: Body armor, and specially designed components therefor, not manufactured to military standards or specifications, not to their equivalents in performance.

1C006.d: Certain fluorocarbon electronic cooling fluids.

1C007.f: Certain ceramic-ceramic composite materials with oxide or glass matrix.

1C009.b: Fluorinated polyimides containing 10% by weight or more of combined fluorine. (Note that this control is a slight rollback, based on % by weight of combined fluorine.)

1C011: Certain metals and compounds.

2B007.d: Robots specially designed to operate at altitudes exceeding 30,000 m.

2B009: Certain spin-forming/flow forming machines.

5E001.b.10: Development technology for spread spectrum and frequency hopping techniques.

6A001.a.2.e: Certain bottom or bay cable systems.

6A005.a.4.c.1: Carbon dioxide lasers having a pulse energy exceeding 5 J per pulse. (Note that this control is a slight rollback, because "peak power" is no longer a controlling parameter.)

6D003.a.3: Software for bottom or bay cable systems.

7D003.e: Computer aided design software.

7E004.a.5: Technology for the development or production of electric actuators specially designed for primary flight control.

7E004.a.6: Technology for the development or production of flight control optical sensor arrays.

8A002.j.4: Certain stirling cycle engine air independent power systems.

9B004: Intermetallic airfoil-to-disk combinations.

In addition, this rule revises the country scope for reports under the Wassenaar Arrangement. The January 15 rule stated that reporting requirements apply to all destinations, except Country Group A:1. This rule revises §743.1(d), Country Exceptions, to state that the reporting requirements apply to all destinations, except Wassenaar member countries, as identified in a new Supplement No. 1 to part 743.

Although the Export Administration Act (EAA) expired on August 20, 1994, the President invoked the International Emergency Economic Powers Act and continued in effect the EAR, and, to the extent permitted by law, the provisions of the EAA in Executive Order 12924 of August 19, 1994, as extended by the President's notices of August 15, 1995 (60 FR 42767), August 14, 1996 (61 FR 42527), August 13, 1997 (62 FR 43629), and August 13, 1998 (63 FR 44121).

Rulemaking Requirements

1. This interim rule has been determined to be not significant for purposes of E.O. 12866.

2. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act (PRA), unless that collection of information displays a currently valid OMB Control Number. This rule involves collections of information subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) These collections has been approved by the Office of Management and Budget under control numbers 0694-0088 and 0694-0201.

3. This rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612.

4. The provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, the opportunity for public participation, and a delay in effective date, are inapplicable because this regulation involves a military and foreign affairs function of the United States (Sec. 5 U.S.C. 553(a)(1)). Further, no other law requires that a notice of proposed rulemaking and an opportunity for public

comment be given for this interim rule. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under 5 U.S.C. or by any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) are not applicable.

However, because of the importance of the issues raised by these regulations, this rule is issued in interim form and comments will be considered in the development of final regulations.

Accordingly, the Department encourages interested persons who wish to comment to do so at the earliest possible time to permit the fullest consideration of their views.

The period for submission of comments will close December 14, 1998. The Department will consider all comments received before the close of the comment period in developing final regulations. Comments received after the end of the comment period will be considered if possible, but their consideration cannot be assured. The Department will not accept public comments accompanied by a request that a part or all of the material be treated confidentially because of its business proprietary nature or for any other reason. The Department will return such comments and materials to the person submitting the comments and will not consider them in the development of final regulations.

All public comments on these regulations will be a matter of public record and will be available for public inspection and copying. In the interest of accuracy and completeness, the Department requires comments in written form.

Oral comments must be followed by written memoranda, which will also be a matter of public record and will be available for public review and copying. Communications from agencies of the United States Government or foreign governments will not be made available for public inspection.

The public record concerning these regulations will be maintained in the Bureau of Export Administration Freedom of Information Records Inspection Facility, Room 4525, Department of Commerce, 14th Street and Pennsylvania Avenue, N.W., Washington, D.C. 20230. Records in this facility, including written public comments and memoranda summarizing the substance of oral communications, may be inspected and copied in accordance with regulations published in Part 4 of Title 15 of the Code of Federal Regulations. Information about the inspection and copying of records at the facility may be obtained from Margaret Cornejo, Bureau of Export Administration Freedom of Information Officer, at the above address or by calling (202) 482-5653.

List of Subjects

15 CFR parts 740 and 743

Administrative practice and procedure, Exports, Foreign trade, Reporting and recordkeeping requirements.

Accordingly, parts 740 and 743 of the Export Administration Regulations (15 CFR parts 730 through 799) are amended as follows:

1. The authority citation for part 740 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 et seq.; 50 U.S.C. 1701 et seq.; E.O. 12924, 59 FR 43437, 3 CFR, 1994 Comp., p. 917; Notice of August 15, 1995, 3 CFR, 1995 Comp., p. 501; Notice of August 14, 1996, 3 CFR, 1996 Comp., p. 289; Notice of August 13, 1997 (62 FR 43629, August 15, 1997); and Notice of August 13, 1998 (63 FR 44121).

2. The authority citation for part 743 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 et seq.; 50 U.S.C. 1701 et seq.; E.O. 12924, 59 FR 43437, 3 CFR, 1994 Comp., p. 917; Notice of August 15, 1995, 3 CFR, 1995 Comp., p. 501; Notice of August 14, 1996, 3 CFR, 1996 Comp., p. 289; Notice of August 13, 1997

(62 FR 43629, August 15, 1997); and Notice of August 13, 1998 (63 FR 44121).

PART 740 - [AMENDED]

3. Section 740.6 is amended by revising paragraph (b) to read as follows:

§740.6 Technology and software under restriction (TSR).

* * * * *

(b) Reporting requirements. See §743.1 of the EAR for reporting requirements for exports of certain items under License Exception TSR. Note that reports are not required for release of technology or source code subject to the EAR to foreign nationals in the U.S. under the provisions of License Exception TSR.

4. Section 740.11 is amended:

a. By revising the heading of paragraph (b)(2)(iii)(A); and

b. By revising the first sentence of paragraph (a) in Supplement No. 1, to read as follows:

§740.11 Governments and international organizations (GOV).

* * * * *

(b) * * *

(2) * * *

(iii) * * *

(A) Items for official use within national
territory by agencies of cooperating governments.

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Supplement No. 1 to §740.11 - Additional Restrictions on Use of
License Exception GOV

* * * * *

(a) Items for official use within the national territory by
agencies of cooperating governments. * * *

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PART 743 - [AMENDED]

5. Section 743.1 is amended:

a. By revising paragraph (b);

b. By adding a note immediately following paragraph

(c)(2);

c. By revising paragraph (d); and

d. By adding a note immediately following paragraph (e)(1)(ii), to read as follows:

§743.1 Wassenaar Arrangement.

* * * * *

(b) Requirements. You must submit two (2) copies of each report required under the provisions of this section and maintain accurate supporting records (see §762.2(b) of the EAR) for all exports of items specified in paragraph (c) of this section under any of the following License Exceptions authorized by part 740 of the EAR: License Exceptions GBS, CIV, TSR, LVS, CTP, GOV and KMI (under the provisions of §740.8(b)(2)(ii) and (iii) only).

Exports of technology and source code under License Exception TSR to foreign nationals in the U.S. should not be reported. For purposes of this part 743, "you" has the same meaning as "U.S. exporter", as defined in part 772 of the EAR.

(c) * * *

(2) * * *

Note to paragraph (c)(2): Exports of computers controlled under 4A003.b to destinations in Computer Tier 3 (see §740.7(d)(1) of the EAR) should not be included in the reports

required under paragraph (c) of this section. Reporting for computers under 4A003.b to Computer Tier 3 destinations should be reported under the post-shipment verification reporting provisions of §740.7(d)(4)(v) or under §742.12(b)(3)(iv) of the EAR.

(d) Country Exceptions. You must report each export subject to the provisions of this section, except for exports to Wassenaar member countries, as identified in Supplement No. 1 to part 743.

(e) * * *

(1) * * *

(ii) * * *

Note to paragraph (e)(1)(ii): For exports of technology for which reports are required under §743.1(c) of this section, the number of units in the shipment should be reported as one (1) for the initial export of the technology to a single ultimate consignee. Additional exports of the technology must be reported only when the type or scope of technology changes or exports are made to other ultimate consignees. Additionally, do not report the release of technology or source code subject to the EAR to foreign nationals in the U.S.

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6. Part 743 is amended by adding a new Supplement No. 1 to read as follows:

SUPPLEMENT NO. 1 TO PART 743 - WASSENAAR ARRANGEMENT MEMBER
COUNTRIES

Argentina

Australia

Austria

Belgium

Bulgaria

Canada

Czech Republic

Denmark

Finland

France

Germany

Greece

Hungary

Ireland

Italy

Japan

Luxembourg

Netherlands

New Zealand

Norway

Poland

Portugal

Romania

Russia

Slovakia

South Korea

Spain

Sweden

Switzerland

Turkey

Ukraine

United Kingdom

United States

Dated:

R. Roger Majak

Assistant Secretary for

Export Administration